ADDITIONAL VIEWS OF REP. JOHN CONYERS, JR.
H.R. 718, UNSOLICITED COMMERCIAL ELECTRONIC
MAIL ACT OF 2001

I strongly support the Sensenbrenner-Conyers substitute amendment to H.R. 718; however, I am writing additional views to indicate my concern that the Hart amendment would violate the First Amendment. The Hart amendment requires the Attorney General to prescribe marks or labels for e-mails containing "sexually-oriented advertisements" that senders of such e-mails must then include in all such transmissions.[1] The penalty for violations of the amendment's provisions includes a fine, imprisonment for not more than one year, or both.[2]

I agree with the general objective of the amendment – keeping sexually-oriented materials away from those who do not want them and minors who should not have them – but do not believe the amendment has been written with the necessary care to pass constitutional scrutiny. I would remind the Members that there are few more complicated or difficult area of the law than Federal regulations and restrictions of speech. This is evidenced by the Supreme Court's 1989 decision to strike down the Federal Communication Commission's dial-a-porn regulations,[3] and its 1997 decision to invalidate portions of the Communications Decency Act ("CDA"), which regulated pornography on the Internet.[4]

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[1]H.R. 718, § 2 (proposing 18 U.S.C. § 622(a)). The amendment defines a "sexually-oriented advertisement" as "any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing, but material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters."

[2]*Id.* Pursuant to 18 U.S.C. § 3559, any violation of the Hart amendment would be classified as a Class A misdemeanor. The fine amounts for all offenses are specified in 18 U.S.C. § 3571. If the offender is an individual, the maximum fine is either $250,000 (if death results) or $100,000 (if death does not result). If the offender is an organization, the maximum fine is either $500,000 (if death results) or $200,000 (if death does not result).

[3]Sable Comm'ns of California v. FCC, 492 U.S. 115 (1989).

[4]Reno v. ACLU, 521 U.S. 844 (1997) (striking down portions of the Communications Decency Act of 1996, Pub. L. No. 104-104, title V, 110 Stat. 56 (1996)). The CDA's successor, the Child Online Protection Act, also is being reviewed in the Supreme Court. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000) (affirming trial court issuance of preliminary injunction against enforcement of Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998), a statute intended to protect minors from harmful material on the Internet), *cert. granted and rev'd sub nom.* Ashcroft v. ACLU, No. 00-1293 (2001).

This line of cases should serve as a signal that, if we are to legislate on this matter, we must do so in a deliberative manner that respects constitutional freedoms. Unfortunately, I do not believe the Hart amendment will withstand First Amendment scrutiny because it contains overbroad restrictions on commercial speech, and may well be found to be void for vagueness and to compel speech.

I. The Amendment Proposes an Overbroad Regulation of Commercial Speech

It is entirely clear that the protections of the First Amendment extend to speech on the Internet,[5] which the Hart amendment proposes to regulate. It is also entirely clear that the First Amendment applies to advertisements or commercial speech, such as the e-mails covered by the Hart amendment.[6] In this regard, the Court has stated that the constitutional test for any regulation of truthful and non-misleading commercial speech is whether the law (1) pertains to a substantial government interest and (2) is reasonably and narrowly tailored to that interest.[7] In this case, it is not clear that the government has a substantial interest in marking sexually-oriented ads, nor is the proposal narrowly tailored to any such alleged interest.

Another recent law, the Children's Internet Protection Act of 2000, is also now the subject of First Amendment challenges. Multnomah County Public Library v. United States, No. 01-CV-1322 (E.D. Pa. filed Mar. 20, 2001); American Library Ass'n v. United States, No. 01-CV-1303 (E.D. Pa. filed Mar. 20, 2001). That law directs that schools or libraries receiving Federal funds to obtain computers for Internet access must utilize technological filters to block access by minors to materials on the Internet having sexual content. Children's Internet Protection Act of 2000, Pub. L. No. 106-554 (2000).

The Supreme Court also has struck down a Federal statute regulating the advertising of contraceptives on the grounds that it violated the First Amendment. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

[5]Reno, 521 U.S. at 844.

[6]The Supreme Court has ruled that "speech is not stripped of First Amendment protection merely because it appears" as a commercial advertisement. Bigelow v. Virginia, 421 U.S. 808, 818 (1975). The Court later affirmed that speech that "does no more than propose a commercial transaction" is protected by the First Amendment. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[7]44 Liquormart v. Rhode Island, 517 U.S. 484 (1996); Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557 (1980). *See also* Letter from Marvin J. Johnson, Legislative Counsel, ACLU, to the Honorable F. James Sensenbrenner, Jr., Chair, House Comm. on the Judiciary, & the Honorable John Conyers, Jr., Ranking Member, House Comm. on the Judiciary 3 (May 23, 2001) [hereinafter *ACLU Letter*].

As to the substantial government interest prong, the Hart amendment presumes that the government has a substantial interest in making consumers and parents aware that they are receiving sexually-oriented advertisements via e-mail. There is, however, no legislative history or congressional finding to support this presumption. The Committee did not hold hearings where any mention was made – either by witnesses or Members – of a need or desire to mark e-mails containing sexually-oriented advertisements. To the contrary, those hearings that Congress did hold on e-mail elicited testimony that the primary problem for e-mail users was the receipt of bulk, unsolicited commercial e-mail, otherwise known as spam.[8] This is not to say that Federal legislation addressing e-mails with sexual content is not needed, but merely that the legislative groundwork has not been laid for such a law.

As to the second prong, the amendment would not appear to be sufficiently narrowly tailored to pass constitutional scrutiny. For example, the intended beneficiaries of the amendment are presumably people who do not want to open e-mails with sexually-oriented ads. Unfortunately, even those who have asked for such ads would see the mark and possibly be deterred from requesting sexually-oriented advertisements.[9] Proponents of the amendment argue that it merely mirrors labeling regulations that exist for regular mail, pointing to 39 U.S.C. § 3010(a) and its implementing regulations, which require distributors of postal mail with sexually-oriented advertisements in them to print "Sexually-Oriented Ad" on a sealed inner envelope that goes in a regular mailer to recipients.[10] Those regulations, however, applied only to solicitors sending sexually-oriented ads to people who had requested them; the regulations did not apply to unsolicited ads.[11] Under the Hart amendment, the marks and labels must be applied to *all* e-mails, regardless of whether they were solicited or unsolicited.

In addition, it is not at all clear that technology, which is much less obtrusive than Federal legislation, could not be used to respond to the problem. For example, there is an entire software

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[8]*See, e.g., Senate Commerce Comm. Hearing* (statement of Jason Catlett, President and Founder, Junkbusters Corp.); H.R. REP. NO. 41, 107th Cong., 1st Sess. 9 (2001).

[9]It has been recognized that restrictions imposed for the benefit of people not wanting solicitations are reviewed differently when they impact people who do want them. Pent-R-Books v. United States Postal Service, 328 F. Supp. 297 (1971), *aff'd in part and rev'd in part*, 538 F.2d 519 (1976), and *cert. denied*, 430 U.S. 906 (1977) (upholding postal regulation on applying marks to postal mail with sexually-oriented ads in them because marks were applied to mailings only for people who had not requested the materials).

[10]*See* MARKUP OF H.R. 718, HOUSE COMM. ON THE JUDICIARY, 107th Cong., 1st Sess. (May 23, 2001) [hereinafter *H.R. 718 Markup*]. Portions of 39 U.S.C. § 3010 were reviewed and upheld in 1971. Pent-R-Books, 328 F. Supp. at 297.

[11]Pent-R-Books, 328 F. Supp. at 313-14.

industry built on filters so people can screen obscene materials, and there are Internet Service Providers that will filter out e-mails for their customers.[12] Considering that technology is available and being further refined, the courts may well question the need for an intrusive new labeling requirement. Furthermore, the restriction may not be reasonably related to the government's interest. It is possible that the marking requirement would do exactly the opposite of what it is intended to do, as such marks actually could encourage children to view sexually-oriented ads.

II. The Amendment May be Void for Vagueness

The Hart amendment also could be found constitutionally void on the grounds that it is vague. The Court has delineated a "strict prohibition of statutes which burden speech in terms that are so vague as either to allow including protected speech in the prohibition or leaving an individual without clear guidance as to the nature of speech for which he can be punished."[13] As one of the leading constitutional law treatises has observed, "to the extent that the law is vague and relates to fundamental constitutional rights, it might have an 'in terrorem' effect and deter persons from engaging in activities, such as constitutionally-protected speech, that are of particular constitutional importance."[14] The American Civil Liberties Union has further noted:

> Laws are supposed to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." . . . Failure to clearly define when speech transgresses the regulation or law [as the Hart amendment fails to do] will unconstitutionally force people to conform their speech to "that which is unquestionably safe."[15]

In this case, the proposal's definition of "sexually-oriented advertisement"[16] may well be seen as unnecessarily vague, could implicate e-mails that its proponents might not intend for labeling, and

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[12]*See* John Schwartz, *Schools Get Tools to Track Students' Use of Internet*, N.Y. TIMES, May 21, 2001, at C6; Steve Woodward, *AOL Selects RuleSpace to Patrol the Internet*, OREGONIAN, May 3, 2001, at B1.

[13]RONALD D. ROTUNDA & JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.9 (2d ed. 1992).

[14]*Id.*

[15]*ACLU Letter* at 4 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) & Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

[16]H.R. 718, § 2 (proposing 18 U.S.C. § 622(b)). This definition comes from 39 U.S.C. § 3010, which requires the labeling of postal materials with sexually-oriented ads in them.

therefore could chill otherwise lawful speech. More specifically, the definition does not specify what is meant by "natural or unnatural sexual intercourse" or "any other erotic subject," and could require the labeling of an e-mail containing an ad for a book about sexual health or even an ad that contains double entendres.[17] Furthermore, in an apparent effort to ensure that e-mails with minimal sexual content do not have to be labeled, the definition carves out e-mails having sexual content that "constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters."[18] Unfortunately, the amendment does not specify what is meant by "a small and insignificant part" – that term could implicate e-mails where ten percent of the content is sexually-oriented or even where two percent is so oriented.

III. The Amendment May Unconstitutionally Compel Speech

It also can be argued that the Hart amendment's labeling requirement represents an unconstitutional compulsion of speech in violation of the First Amendment. The Supreme Court has held that requiring private entities to provide disclosures implicates the First Amendment.[19] The Court has further ruled in the commercial context that, when the government requires disclosures, "an advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[20] In this case, the Hart amendment requires disclosures of e-mails containing sexually-oriented commercial speech but is *not* intended to "prevent deception of consumers." For that reason, the requirement could be seen as unconstitutional.

Proponents of the labeling requirement may argue that other forms of media – movies, television shows, and music – are labeled for sexual or violent content. There is, however, a significant difference between that labeling and what the Hart amendment proposes. Current labeling of content is done *voluntarily* by the private industries that distribute the media so that potential purchasers (or their parents) will be aware of what is being provided. Efforts in Congress to require labeling of those media have been previously rejected on the grounds they would violate the First Amendment.[21]

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[17]*See ACLU Letter* at 3.

[18]*See* H.R. 718, § 2 (proposing 18 U.S.C. § 622(b)).

[19]Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) (striking down a state statute requiring professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations).

[20]Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1984).

[21]*See, e.g.*, 145 Cong. Rec. H4491-H4499 (daily ed. June 17, 1999) (debate on Wamp amendment to H.R. 1501, which was defeated 161-266).

CONCLUSION

The protections of the First Amendment should not turn back at the doorstep of commercial speech. In fact, it is the protection that commercial speech receives that ensures that the right to engage in non-commercial speech will be limited in only the most extreme circumstances. For that reason, limitations on commercial speech must be reasonably and narrowly drafted to areas in which the government maintains a substantial regulatory interest. Unfortunately, the Hart amendment subjects a class of commercial speech to lesser constitutional protection than it otherwise deserves and does so without the foundation of even a single congressional hearing. I urge the Members to reconsider this hastily-drafted provision as we move to the floor.

John Conyers, Jr.